

STATE OF MICHIGAN
COURT OF APPEALS

SONJA BERRY,

Plaintiff-Appellant,

v

DARRYL BERRY,

Defendant-Appellee.

UNPUBLISHED

July 24, 2007

No. 273427

Livingston Circuit Court

LC No. 04-036033-DM

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

In this divorce action, plaintiff appeals the trial court's judgment and division of the marital estate. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. Custody

Plaintiff says that the trial court erred in failing to determine whether an established custodial environment existed before the court addressed the 12 best interest factors, MCL 722.23, and awarded physical custody of the parties' two sons to defendant. In addition, plaintiff claims that, because a joint custodial environment existed, the trial court further erred in failing to determine whether it was established by clear and convincing evidence that a change in the custodial environment was in the best interests of the children. We must affirm a custody order unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 282-283; 668 NW2d 187 (2003).

A trial court may not issue, modify, or amend a child custody order, which changes an established custodial environment, unless there is clear and convincing evidence that such a change is in the best interest of the child. MCL 722.27(1)(c); *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). However, if an established custodial environment does not exist, the custody of a child is determined by showing, by a preponderance of the evidence that a certain placement is in the child's best interest. *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993). A custodial environment is established if the environment is one of significant duration, both physical and psychological, in which the relationship between the child and custodian is marked by security, stability and permanence. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). An established custodial environment exists "if over an appreciable

period of time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” MCL 722.27(1)(c). A trial court must make specific factual findings regarding whether an established custodial environment exists. *Jack, supra* at 670.

Here, the trial court failed to determine whether an established custodial environment existed. However, remand is unnecessary because there is sufficient information in the record to allow us to make this finding. *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991). Beginning almost three months before trial, there were repeated changes in the physical custody of the children. While the two sons remained in the marital home, the parties rotated living in the marital home on a weekly basis. This living arrangement continued throughout the course of trial, which took place over five months. “[R]epeated changes in physical custody and uncertainty created by an upcoming custody trial” may destroy a custodial environment and prevent the establishment of a new custodial environment. *Bowers, supra* at 326. Here, we find that the regular and repeated changes in the physical custody of the parties’ two sons, along with the uncertainty created by the custody trial, means that there was no established custodial environment. And, though the arrangement of the parties rotating weeks with the children in the marital home, created a stable *physical* environment, the record reveals that there was no psychological environment of significant duration, marked by security, stability and permanence. *Baker, supra* at 579-580. Thus, because there was no established custodial environment and because a preponderance of the evidence supported the trial court’s determination that residing with defendant was in the best interests of the parties’ two sons, we affirm the trial court’s custody order. *Bowers, supra* at 324.

II. Value of the Marital Estate

Plaintiff also contends that the trial court erred when it failed to make specific factual findings regarding the value of the marital estate. In reviewing a trial court’s division of the marital estate, we review the trial court’s findings of fact for clear error. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). If we uphold the trial court’s factual findings, we must decide if the property division was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

If the value of a marital asset is in dispute, the trial court must make a specific factual finding regarding the value of the asset. *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). A trial court clearly errs when it fails to place a value on a disputed piece of marital property. *Id.* at 627-628. Here, the value of the marital home was in dispute. At trial, plaintiff maintained that the value of the marital home was \$358,000, the proposed listing price made by a realtor. On the other hand, defendant submitted two appraisals that valued the marital home at either \$300,000 or \$305,000. Despite this dispute, the trial court failed to place a value on the marital home, the primary asset of the marital estate, before the court divided the estate. Accordingly, the trial court clearly erred. *Id.* Because of the trial court’s error, we are unable to determine whether the trial court’s division of the marital estate was equitable in light of the facts and circumstances. *Sparks, supra* at 151-152. Thus, we vacate the trial court’s division of the marital estate and remand for a factual finding regarding the value of the marital home. On remand, if, after it places a value on the marital home, the trial court again chooses to require defendant to assume the marital debt instead of awarding plaintiff an equal share of the equity in the marital home and dividing the debt, the trial court shall make specific factual findings

regarding the amount of the marital debt defendant is to assume. While we acknowledge defendant's testimony regarding the amount of the marital debt was not disputed by plaintiff at trial, such factual findings will facilitate further appellate review regarding the property division. When determining the amount of marital debt, the court, as the trier of fact, must carefully consider whether loans taken by defendant from his employer and family can be considered as marital debt.¹

III. Spousal Support

Plaintiff also maintains that the trial court erred in denying her request for spousal support. We review a trial court's decision on a request for spousal support for an abuse of discretion. *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003). We first review the trial court's findings of fact for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). If we uphold the trial court's findings of fact, we must then decide whether the trial court's decision was fair and equitable in light of those facts. *Id.*

The purpose of spousal support is to balance the incomes and needs of the divorcing parties in a way that will not impoverish either party. *Olson, supra* at 633. Spousal support is to be based on what is just and reasonable under the circumstances. *Id.* Factors in determining what is just and reasonable include the following:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. In addition, the court may consider a party's fault in causing the divorce. [*Thames, supra* at 308 (citations omitted).]

The trial court stated that three factors influenced its decision not to award spousal support: (1) plaintiff's infidelity; (2) plaintiff's failure to admit to her infidelity; and (3) plaintiff's unjustified attempt to portray defendant as a bad man. Thus, the trial court's decision to deny plaintiff's request for spousal support was based on only one of the 12 factors. In deciding whether to award spousal support, however, a trial court must consider all relevant factors. *Sparks, supra* at 158. It may not give disproportionate weight to any one factor. *Id.*; *Gates v Gates*, 256 Mich App 420, 437; 664 NW2d 231 (2003). Because the trial court failed to consider all relevant factors before it denied plaintiff's request for spousal support, we find that it abused its discretion when it denied plaintiff's request for spousal support. *Korth, supra* at 289. We vacate the trial court's order barring spousal support and remand for further factual findings.

¹ Attorney fees are not marital debt and the record supports that the personal loans were used to pay defendant's attorney fees.

In reaching our conclusion, we recognize that the trial court made factual findings regarding some of the 12 factors, including the past relations and conduct of the parties, the parties' ages, and the abilities of the parties to work, when reviewing other matters before it. We find that none of the trial court's factual findings regarding these factors were clearly erroneous. *Moore, supra* at 654. Specifically, with regard to plaintiff's contention that the trial court mixed apples and oranges when it allocated to defendant a post-tax income of \$111,000 and imputed to her a gross income of \$25,000, we find such contention to be without merit. Defendant testified that his 1099 indicated that he earned a gross income of approximately \$158,000 and that, after he deducted his business expenses, he would be left with an income of \$111,000. From this \$111,000, defendant still had to pay approximately \$30,000 in taxes. Thus, based on defendant's testimony, the trial court did not allocate to him a post-tax income. Nonetheless, the trial court failed to make factual findings regarding other relevant factors, including the ability of defendant to pay alimony, the present situation of the parties, the needs of the parties, and the prior standard of living of the parties. The trial court should make factual findings on these factors before it decides plaintiff's request for spousal support. *Sparks, supra* at 159.

IV. Attorney Fees

Plaintiff complains that the trial court erred when it denied her request for attorney fees. We review a trial court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). A trial court abuses its discretion when it fails to select a principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Pursuant to MCL 552.13(1), attorney fees may be granted in a divorce action. However, they are not recoverable as of right. *Id.* As this Court explained in *Olson, supra* at 635:

A trial court may order one party to a divorce to pay the other party's reasonable attorney fees and litigation costs if the record supports a finding that financial assistance is necessary because the other party is unable to bear the expense of the action. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). The reason for the rule is that no party should have to invade the assets the party relies on for support in order to obtain representation. *Id.*

"Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

In light of evidence regarding plaintiff's income, her child support obligation and the minimal award of marital assets, we hold that the trial court abused its discretion when it denied plaintiff's request for attorney fees. Though the trial court correctly observed that plaintiff had an affair and filed for divorce and that defendant did not want to divorce plaintiff, plaintiff's decision to file for divorce does not constitute "unreasonable conduct in the course of litigation." *Hanaway, supra* at 298. Thus, the pertinent inquiry is whether plaintiff had sufficient income to bear the expense of her attorney fees, whether she would have to invade the assets awarded to her in order to pay, and whether defendant is better able to pay. See MCR 3.206(C)(2). Because we find it necessary to remand this case for a redetermination of the value and distribution of the marital home and spousal support, the trial court shall also reconsider plaintiff's request for

attorney fees to determine whether the income and assets awarded to each party justifies an award of attorney fees to plaintiff. *Gates, supra* at 438-439.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Deborah A. Servitto